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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

15165

[Protest of Department of Agriculture Request For Proposals]

FILE: B-198020

DATE: October 10, 1980

MATTER OF: Tymshare, Inc.

DIGEST:

1. Protester argues that RFP did not clearly delineate relative importance of cost vis-a-vis technical factors in determining award of contract. Reading RFP as a whole, reasonable offeror should have concluded that cost is secondary to quality. However, even assuming that RFP was deficient in that respect, protest is denied because all offerors were informed of relative importance of cost by contracting officer during course of protest and before due date for best and final offers. Therefore, no offeror was prejudiced by alleged defect.
2. Provision requiring successful offeror to provide technical assistance to Government when Government reviews effectiveness of system developed by contractor in earlier phase of contract does not create organizational conflict of interest.
3. Contention that requiring contractor to set acceptance standards for system tests and to manage system constitutes improper use of consulting services is denied where subsequent amendments require contractor to submit acceptance standards to Government technical experts for acceptance or rejection prior to testing and where system management requirement was deleted by amendments.

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4. Requiring contractor to operate system in final phase of contract is not violation of "Pellerzi standards," which prohibit contracting out functions normally performed by civil servants in manner requiring close Government supervision, where system operation is integral part of final phase of system development by contractor and RFP provides that contractor's employees are not subject to supervision by Government employees.
5. Allegations raised during pendency of protest, which are independent of initial protest allegations, must independently meet timeliness requirements of Bid Protest Procedures. Here, new allegations were filed more than 10 days after grounds were known, and, therefore, are untimely.

[Tymshare, Inc. (Tymshare), protests several provisions of request for proposals (RFP) FNS 80-04RS, issued by the Food and Nutrition Service, Department of Agriculture (Agriculture). The RFP is for the design, implementation, installation, testing and maintenance of a system to obtain data on the food stamp program.]

[Tymshare contends that the evaluation criteria contained in the RFP do not apprise offerors of the relative importance of cost and technical factors. Tymshare also alleges that the RFP creates an impermissible conflict of interest by requiring the successful offeror to evaluate its own contract performance. Finally, Tymshare contends that certain tasks required by the RFP should not be contracted out because they violate Government guidelines concerning the use of consultants and because they require the contractor to perform functions normally performed by civil servants--a violation of the "Pellerzi standards."

Tymshare's protest regarding these issues is [] denied.

Based on information received at a debriefing, Tymshare recently raised new issues concerning Agriculture's evaluation of proposals. These issues are dismissed as untimely.

Evaluation Criteria

The RFP provided the following breakdown of technical factors and the relative weights:

	<u>Weight</u>
"I. Technical Approach and Work Plan [descriptive narrative omitted]	45
II. Capabilities of the Offeror [descriptive narrative omitted]	40
III. Availability of Offeror's Resources [descriptive narrative omitted]	15 "

The following guidance was provided concerning cost:

"NOTE: Cost is a factor. However, it is an unweighted factor. The closer the technical scores become as part of the evaluation process, the more significant costs will become."

Amendment 3, issued in response to the protest, added this to the evaluation criteria:

"The degree of the importance of cost as an evaluation factor will increase with the degree of the equality of the proposals in relation to the other factors on which selection is to be based."

Tymshare argues that these statements do not apprise offerors of the relative weight of cost in the evaluation scheme, as required by section 1-3.802(c) of the Federal Procurement Regulations (1964 ed., amend. 194, Sept. 1978) and by our decisions. Therefore,

Tymshare argues, offerors have no way of determining where to place the emphasis in proposals. It contends that this is especially prejudicial here because the technical requirements are such that if an offeror proposes in excess of the required minimum level, more staffing and more system flexibility can be offered at a greater cost. Without knowing the relative weights of cost and technical factors, Tymshare argues, offerors have no idea of how much staffing and flexibility to offer above the minimum.

Agriculture essentially argues that the relevant regulations and decisions do not require agencies to disclose the numerical weight of evaluation factors, but only require that the relative values of technical and price factors be provided. Agriculture feels that the statements here meet that requirement. In response to the protest, Agriculture states:

"It is clear from the evaluation criteria, as stated; that technical considerations are primary, cost factors may be used in a tie-breaking situation, costs of technically unacceptable proposals will not be evaluated and an award may be made at a higher price to an offeror presenting a clearly superior technical proposal."

We have always held that offerors should be informed of the broad scheme of scoring to be employed and given reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. 51 Comp. Gen. 153 (1971); 50 Comp. Gen. 246 (1970). At a minimum, offerors must be told "* * * whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality." Signatron, Inc., 54 Comp. Gen. 169 (1974), 74-2 CPD 386.

While the statements concerning cost are drafted inarticulately, when read in the context of the entire RFP it is apparent that cost is secondary to technical

quality. However, even assuming that the RFP statements were unclear in defining the relative importance of cost, Agriculture's above-quoted statement, in response to the protest, clarified the role of cost in the evaluation. This statement was received by all offerors prior to the due date for best and final offers; therefore, all were on notice of the relative importance of cost and technical factors and none were prejudiced by any lack of clarity in the RFP.

Conflict of Interest

Tymshare initially argued that an organizational conflict of interest was created by the RFP provision requiring the contractor, after developing the system, to evaluate its effectiveness. Another potential conflict was created by the requirement that the contractor prepare specifications for follow-on hardware and teleprocessing services procurements, on which it might compete. Agriculture amended the RFP to delete the specification preparation task and to change the system evaluation task to one of providing technical assistance to Agriculture when the agency evaluates the system.

Tymshare feels that the deletion of the specification preparation task eliminated any potential conflict of interest that might have been created by permitting the contractor to compete for follow-on contracts. However, Tymshare requests that we still rule on the issue to preclude the possibility of a protest on a follow-on procurement. Since both parties agree that the amendment cured the problem, the issue is academic and we will not rule on academic issues. See Universal Design Systems Inc., B-196682, April 23, 1980, 80-1 CPD 290.

Concerning system evaluation, the RFP originally stated:

"Task 24: System assessment - the contractor will provide for a review of the effectiveness of the system based on State and User assessment. (February 1, 1981)."

Amendment 3 deleted the above and substituted:

"The contractor will provide technical assistance during the Government's Review of the effectiveness of the system based on State and User Assessment. (Feb 1, 1981)."

Agriculture feels that this change eliminated any potential conflict of interest inherent in the initial statement of the task. Tymshare argues that to eliminate the potential for a conflict of interest, the contractor must be eliminated entirely from system evaluation. Tymshare relies on our decision, Columbia Research Corp., B-185843, July 1, 1976, 76-2 CPD 2, for the proposition that the system development contractor may not provide technical assistance to the Government for system evaluation.

The responsibility for determining whether a conflict of interest exists rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. See Institute of Gas Technology, B-193497, May 10, 1979, 79-1 CPD 329; Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 91 (1976), 76-1 CPD 202.

The determination was not unreasonable. The contractor will merely be providing technical assistance; the Government will be performing the review, which will be based on State and user assessment. While Tymshare argues that our holding in Columbia Research Corp., supra, prohibits a system development contractor from providing even technical assistance in system evaluation, the protester has read the decision too broadly. In that case, the RFP required the successful contractor to provide technical assistance in the Government's review of the Reliability Program of an applicant for a permit to construct a nuclear reactor. One of the tasks required the successful contractor to perform independent reliability analyses which involved evaluation of a reliability standard developed by the protester

in a previous procurement. We found that it was reasonable for the Government to prohibit the protester from competing, because the firm would be performing an independent analysis of that standard, not merely assisting in a Government analysis. Here, the contractor would not be performing an independent system evaluation, but would merely be providing whatever technical assistance the Government might require in conducting the evaluation.

Contracting Out

Tymshare objects to the responsibility imposed on the successful contractor by the RFP requirement that the contractor set test standards for the system and act as system manager, because those duties are "so integrally connected to Government management decisions that they simply cannot be contracted out." Tymshare alleges that consulting services cannot be used to perform work of a decisionmaking or managerial nature.

Regarding the development of system test standards, Agriculture states that the requirement for contractor development and documentation of test standards is a routine function performed during the development of any system. Agriculture argues that amendment 5 to the RFP removed any possible misuse of consulting services.

Office of Management and Budget Circular No. A-120, effective April 14, 1980, provides guidelines on the use of consulting services. The task in question does not violate the guidelines set forth in the circular. The RFP initially required that the successful contractor provide the test standards. After the protest was filed, Agriculture attempted to satisfy the protester's objections by amendment. Amendment 3 provides that the test standards must be submitted to the contracting officer's representative for review and approval in advance of the tests, and amendment 5 states that the acceptance or rejection of the test standards will be decided by "government technical expertise." The development of test standards, which must be submitted to agency officials for approval,

is not "work of a policy/decision making or managerial nature."

Concerning the requirement that the contractor manage the system, Agriculture argues that management is no longer required, as the amendments require only that:

"* * * the successful contractor
* * * perform the routine functions
involved in the day to day operation
of the system until such time as it
is fully operational and documented."

Originally, the RFP stated generally that the contractor would provide "systems operational management" from the initiation of the pilot system until termination of the contract. Task 11 also provided that the contractor would manage the system, specifically with regard to the activities of States in providing data. Amendment 3 deleted the management functions in both provisions, leaving only the operating functions. The amendment also added a general statement that:

"Program management functions and
overall responsibility will be
retained by the Government through-
out the period of performance."

Amendment 5 added a definition of "operate the system," which had no reference to managerial tasks.

Tymshare's response to the agency protest report points out, for the first time, that another section of the RFP, which had not been protested or amended, provided generally that:

"In effect, the contractor will serve
as systems manager for a test period
of about six months * * *." (RFP at
p. 40).

Therefore, Tymshare argues, notwithstanding the amendments, the RFP still requires the contractor to act as systems manager.

We think that the amendments successfully deleted the requirement for the contractor to act as systems manager, thereby curing any potential violation of the consulting services guidelines. Solicitations must be interpreted by reading them as a whole and construing them in a reasonable manner. See, e.g., Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358. Here, while the statement on page 40 could be construed as requiring the contractor to be a systems manager, in light of the specific deletion of that requirement at every other point in the RFP after the requirement was protested, we do not think it reasonable to conclude that the contractor must manage the system.

Finally, Tymshare alleges that the requirements that the contractor, in the final phase of the contract (phase 4), operate the system and "* * * serve as the technical and administrative representative for the Government, and * * * develop a plan for transition of these functions to FNS personnel" was a prima facie violation of the "Pellerzi standards." These standards prohibit contracting out functions normally provided by Civil Service personnel in a manner which creates an employer-employee relationship between contractor personnel and supervisory Government officials. Tymshare argues that it "appears impossible to perform 'technical and administrative representative' functions without close supervision by Government employees."

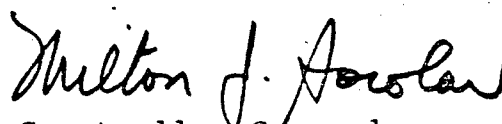
In response to this allegation, Agriculture, in amendment 3, deleted the requirement that the contractor perform as the Government's technical and administrative representative and argued that any potential problem had been cured. However, Tymshare still feels that operating the system is something that civil servants would normally do and that close supervision by Government employees will be required.

The requirement, in phase 4, that the contractor operate the system for a transitional period is not a violation of the Pellerzi standards. This contract is for the design, implementation and testing of a new and unique quality control system that will be turned over to the Government for continuous operation.

In essence, phase 4 involves the final period of documenting and testing the system, aiding Government personnel in assessing the effectiveness of the system, and providing for a smooth transition to Government operation of the system. We do not think that operating the system, in the context of performing these functions as the final phase of development of the system, is the kind of function that civil servants would normally perform. Also, the RFP specifically provides that Government employees will not supervise the contractor's employees.

New Allegations

[On September 29, 1980, we received a letter from Tymshare in which it made new allegations concerning Agriculture's evaluation of proposals. According to Tymshare, it received the information underlying these allegations at a debriefing held on August 26, 1980. Where, as here, a protester initially files a timely protest and later supplements it with new and independent grounds, the new grounds must independently satisfy the timeliness criteria of our Bid Protest Procedures.] Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412. Our Procedures require that protests of this type be filed within 10 days after the basis for protest is known. 4 C.F.R. § 20.2(b)(2) (1980). [Since the letter was received here more than 10 days after the debriefing, the issues are untimely and will not be considered.]



For the Comptroller General
of the United States